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FILED

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SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES, STATE OF UTAH

IN THE MATTER OF THE REQUEST)	
FOR AGENCY ACTION AND APPEAL)	
OF DIVISION DETERMINATION)	REQUEST FOR RE-HEARING AND
TO APPROVE SIGNIFICANT)	MODIFICATION OF ORDER DATED
REVISION TO PERMIT TO ALLOW)	JUNE 13, 1995, BY UTAH BOARD
MINING OF TANK SEAM BY CO-OP)	OF OIL, GAS AND MINING
MINING COMPANY BY PETITIONERS)	
NORTH EMERY WATER USERS)	
ASSOCIATION, HUNTINGTON-)	
CLEVELAND IRRIGATION COMPANY,)	Docket No. 94-027
AND CASTLE VALLEY SPECIAL)	
SERVICE DISTRICT, CARBON)	Cause No. ACT/015/025-93B
COUNTY, UTAH.)	
)	

Petitioners, by and through their counsel of record, hereby jointly request a re-hearing and modification of the Order dated June 13, 1995, for the purposes and reasons set forth below.

INTRODUCTION AND FACTUAL BACKGROUND

The hearing by the Utah Board of Oil, Gas and Mining ("Board") on October 25, 1994, and November 17, 1994, was specifically limited to a review of the Division of Oil, Gas and Mining's ("DOGM") approval of significant revision to permit to allow the mining of the Tank Seam by Co-Op Mining Company (Request for Agency

Action ¶¶2 and 3) (see also R645-300-211 and R645-303-223). As articulated by counsel for Co-Op at pg. 1 of their document entitled Closing Argument dated December 17, 1994:

"Petitioners are only entitled to a hearing on the reason for DOGM's decision to approve the significant revision. Petitioners did not request a NOV or other agency action based on CWM's past mining activity. Petitioners did not request, are not entitled to, and did not receive a hearing on whether to approve or modify CUM's existing permit. [citation omitted] Under R645-300-211 and the relief Petitioners request in their Request for Agency Action, the only question is whether CUM satisfied the requirements for approving the significant revision to permit mining the Tank Seam."

The information submitted by Petitioners concerning the regional aquifer and the movement of water through the stratigraphy in the area of the Co-Op Mining operations was to place the proposed Tank Seam in a context with those operations and to avoid the segmented view of the operations Petitioners believed Co-Op and the DOGM had taken in prior proceedings.

Despite the jurisdictional limitations placed upon the proceeding under statute, rule, by counsel (Mitchell T13, T16 and T24; Appel T84, T162; Smith T331-4, T430-34; and Hansen--nearly continuously) and by consistent reminder by the Chairman throughout the proceedings (T29-30, T87-88, T150), the Board has reached beyond its jurisdictional parameters and included findings of fact and conclusions of law concerning the hydrologic effect of mining in the Blind Canyon seam. As articulated by the Board and all counsel throughout the proceeding and found by the Board in its Order, those were not the issues before the Board and such rulings

were unnecessary and far beyond the scope of the issue concerning the Tank Seam.

ARGUMENT

Only two issues were presented by Petitioners: 1) was the permit revision for the Tank Seam properly studied, processed and approved by the DOGM; and 2) if material damage to the hydrology was created by that mining or if it was to occur, what replacement water sources were available to mitigate the adverse impacts of the mining activity?

In the course of its Order, the Board has fully recognized and embraced the above-referenced scope of these proceedings. Yet, it has gone beyond its acknowledged jurisdictional scope and incorporated Findings of Fact and Conclusions of Law concerning the hydrologic effect of mining in the Blind Canyon seam (Findings 42 through 53 and Conclusions of Law 6 through 9). As the Board stated at Conclusion of Law No. 4, ¶20:

"Co-Op's application for Significant Permit Revision involved only a proposal to mine the Tank Seam. Co-Op's current operations in the Blind Canyon seam are authorized under the terms of Co-Op's existing permit, which has not been challenged in this proceeding. The principal issue of law before the Board is whether possible negative hydrologic impacts of operations in the Blind Canyon seam should be considered here, or whether only impacts from mining in the Tank Seam may be considered."

and at Conclusion No. 6, pg. 20-21:

"The Board therefore does not believe that it is relevant to consider the hydrologic impacts of existing mining in the permit area."

At the hearings, Mr. Mitchell on behalf of the DOGM and the attorneys for Co-Op made countless repeated objections concerning the relevance of the hydrologic impacts of existing mining in the permit area and the Board took that issue under advisement. Obviously, that objection was sustained in the course of this Order.

It is important to note that in response to these repeated objections, counsel for Petitioners indicated that they were not attempting to adjudicate or re-adjudicate the permit for the currently mined area. Rather, the evidence was produced to provide a context within which to review the mining of a certain stratigraphic layer known as the Tank Seam. That was all the evidence was designed to illuminate. Had the existing mining area and its impacts been the issue before the Board, then the evidence produced by Petitioners would have been substantially different and far more complete. To make factual findings and legal rulings upon issues not before the Board based upon evidence put in for an entirely different purpose is beyond the scope of the jurisdiction of the Board and grossly unfair and prejudicial to Petitioners in future proceedings. The proper approach is to modify the Order to include only that information absolutely necessary to support the issue that is actually before the Board. In this case, only the findings and conclusions necessary to uphold the approval by DOGM for the Tank Seam.

It is a basic tenant of administrative law that jurisdiction of an administrative agency is limited by the grant of jurisdiction

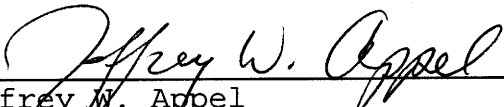
to the agency. See Blaine Hudson Printing v. Tax Commission, 870 P.2d 291 (Utah App. 1994). While procedural jurisdiction is generally granted to the Board to review division determinations by Utah Code Ann. §40-10-14(3). The scope of such review is limited to the subject matter presented by the division determination appealed. In Blaine Hudson Printing, the Utah Court of Appeals held that "[b]oth courts and quasi-judicial administrative agencies must have subject matter jurisdiction to validly decide a controversy." In the instant action there was no notice that the Board would make a decision concerning the hydrologic effect of mining in the existing permit area of the Blind Canyon seam. All counsel and the chairman of the Board agreed that the evidence had to tie to impacts of the Tank Seam and the evidence was presented in that fashion and for that purpose alone. That stipulation completely defined the parameters of the jurisdiction of the proceeding and, by definition, did not include an adjudication of the impact of mining on the Blind Canyon seam.

In the case of Parkdale Care Center v. Frandsen, 837 P.2d 989 (Utah App. 1992), the Court held that while an administrative agency may have jurisdiction to adjudicate certain claims, it cannot adjudicate other claims over which it has no jurisdiction brought before it in the same proceeding. That principle is applicable here and requires the exclusion, at a minimum, of ¶¶ 42 through 53 from the Findings of Fact and ¶¶ 6 through 9 from the Conclusions of Law. In that the Board ruled it did not have jurisdiction to consider those impacts and they were not relevant

to the inquiry before it, such Findings and Conclusions may not appear in the Order. Their inclusion is inconsistent with the Board's jurisdictional rulings.

Petitioners respectfully request that the Board's Order be so modified. A hearing and right of reply is requested in this matter.

Respectfully submitted this 10th day of July, 1995.



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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 1995, I caused a true and correct copy of the foregoing Request for Re-hearing and Modification of Order Dated June 13, 1995, by Utah Board of Oil, Gas and Mining to be mailed, postage prepaid, to the following:

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